

FEB 25 2002

RECEIVED
FEDERAL ELECTION
COMMISSION

2002 FEB 25 PM 3:44

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5237

DATE COMPLAINT FILED: October 9, 2001

DATE OF NOTIFICATION: October 16, 2001

DATES SUPPLEMENTS FILED:

October 24 and 29, November 6, 13, 14, 15
and 16, and December 3, 12, and 27, 2001;
and January 2 and 22, 2002

DATE ACTIVATED: January 2, 2002

EXPIRATION OF STATUTE OF

LIMITATIONS: June 15, 2004

STAFF MEMBER: Lawrence L. Calvert Jr.

COMPLAINANT: David L. Whitehead

RESPONDENTS: Paul L. Friedman
Colleen Kollar-Kotelly
Judith Rogers
Clinton-Gore '96 Primary Committee, Inc.
and Joan Pollitt, as treasurer
Clinton-Gore '96 General Committee, Inc.
and Joan Pollitt, as treasurer¹

RELEVANT STATUTES: 2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 437g(a)(1)
11 C.F.R. § 111.4

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

¹ A review of the complaint and supplements reveals a host of allegations against numerous other persons and entities. However, the factual allegations pertaining to these persons and entities describe conduct that at best is only remotely related to the subject matter of the Federal Election Campaign Act of 1971, as amended ("the Act"). Moreover, the legal allegations pertaining to these persons and entities are either entirely absent, involve statutes not within the Commission's jurisdiction, or consist of no more than a conclusory allegation that the subject "violated provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. § 431, et seq." See, e.g., MUR 5237, Supplement to the Complaint, November 6, 2001 (purporting to add new respondents). Only for the respondents listed above did complainant make any more than the conclusory legal allegation just described; accordingly, only the respondents listed above were notified.

I. GENERATION OF MATTER

This matter was generated by a complaint filed by David L. Whitehead of Oxon Hill, Maryland. *See* 2 U.S.C. § 437g(a)(1). The complaint was supplemented by twelve additional filings by Mr. Whitehead between October 2001 and January 2002.²

Respondents Paul Friedman and Colleen Kollar-Kotelly are judges of the U.S. District Court for the District of Columbia ("District Court") and respondent Judith Rogers is a judge of the U.S. Court of Appeals for the District of Columbia Circuit ("Court of Appeals"). The Clinton-Gore '96 Primary and General Committees, and Joan Pollitt, as treasurer of both committees, are also respondents.

After responding substantively, Judges Friedman and Kollar-Kotelly filed a "Motion to Dismiss." Consistent with standard pre-activation practice, the "motion" has been treated as part of their response to the complaint. However, the "motion," which adds nothing substantive to the judges' original response, in fact appears to be more in the nature of a request for expedited treatment. According to the judges, expedited treatment is warranted because "the complainant has now filed papers before the District Court seeking to use his action before the Commission as a basis for transferring cases or otherwise influencing the course of litigation in that Court" and because "the continued need for the Judges to retain counsel during the pendency of this matter may lead to recusals by the Judges in unrelated matters in which their counsel is participating." MUR 5237, Friedman/Kollar-Kotelly Motion to Dismiss at 1-2. In addition, the judges may be unable to sit in any litigation involving the Commission while this matter is active; counsel for

² The complainant informed staff that he, or counsel on his behalf, was likely to file additional supplemental material on Friday, February 8, 2002. However, as of February 22, 2002, no such material has been received. If additional material is submitted while this report is on circulation to the Commission, this Office will circulate the material to the Commission as an addendum.

1 Judge Kollar-Kotelly informed staff in a telephone conversation in early December, 2001, that
2 the judge had recused herself from assignment of the currently pending *Judicial Watch v. FEC*,
3 No. 01-CV-1747 (D.D.C.), because of her status as a respondent in this matter.

4 Moreover, the unusually frequent, numerous, and voluminous nature of complainant's
5 supplements has taxed the Commission's limited resources, inasmuch as each supplement must
6 be copied numerous times and copies must be provided to the respondents. It has also caused
7 expense and inconvenience for the respondents, whose counsel have had to review the
8 supplemental material and have generally filed responses to it, albeit short ones stating in essence
9 that nothing in the supplemental material merited any addition to their original response.³

10 Given these unique circumstances, this matter was activated and assigned to staff as soon
11 as practicable in order to minimize further drain on the Commission's resources and any
12 unintentional negative impact the Commission's enforcement process might have on the
13 administration of justice in the District Court.

14 **II. BACKGROUND, COMPLAINT, AND RESPONSES**

15 The complainant in this matter appears to be a frequent litigant in the District Court, the
16 District of Columbia Superior Court, and other courts. In particular, on June 14, 2000, the
17 District Court noted that

18 in the last eight years, [complainant] has filed no less than 23 lawsuits in this
19 jurisdiction. In addition to this and six other copyright infringement cases
20 currently pending before this Court, [complainant] has filed numerous suits
21 against other film companies, publishing companies, actors, producers, writers
22 and directors, President Clinton, the United States Department of Justice, the

³ These circumstances have caused frustration on the part of respondents' counsel, as well as expense for their clients. For instance, after filing a straightforward, substantive response to the complaint, and a brief, straightforward response to several of the supplements, Judge Rogers's counsel wrote in a second supplemental response that he hoped "the Commission will move promptly to dismiss this frivolous complaint before another file cabinet is consumed by Mr. Whitehead's detailed observations concerning why 'Hollywood is like CBS's "Survivor" Show.'" MUR 5237, Rogers Supplemental Response, December 21, 2001.

Washington Post, the Internal Revenue Service, a District of Columbia School Superintendent, and Georgetown University. Every one of these suits has been dismissed or resolved in defendants' favor.

Whitehead v. Columbia Pictures Indus., Inc., No. Civ. A. 98-2938 (PLF), 2001 WL 1218908 at *3 and cases cited therein at n.3 (D.D.C. June 14, 2000), *aff'd*, No. 00-7169, 2001 WL 135853 (D.C. Cir. Jan. 19, 2001), *reh'g. en banc denied* (D.C. Cir. June 21, 2001).⁴ A number of complainant's unsuccessful lawsuits alleged that several major motion pictures, novels, and recordings infringed his copyrights and amounted to theft of his intellectual property. *See, e.g., Columbia Pictures* at *4 - *11; *Whitehead v. Paramount Pictures Corp.*, 53 F. Supp.2d 38 (D.D.C. 1999), *aff'd*, No. 99-7137, 2000 WL 33363291 (D.C. Cir. Apr. 19, 2000), *pet. for cert. dismissed*, 531 U.S. 1033 (2000) (petition dismissed after leave to proceed *in forma pauperis* denied under Supreme Court Rule 39.8, which permits denial of pauper status if underlying petition is "frivolous or malicious"). In the District Court, these cases were assigned to, and eventually dismissed by, Judge Friedman. *Columbia Pictures* at *3 n.3 and *13. Judge Friedman's dismissals of the cases form the underlying basis of the complaint filed with the Commission.

Complainant alleges that Judge Friedman, who was nominated by President Clinton, made his rulings in order to benefit President Clinton and/or possibly contributors to President Clinton and that the rulings should "be viewed by the Commission as in-kind political and economic contributions to the Clinton/Gore 1996 election cycle." MUR 5237, Complaint at 20. The complainant does not specifically allege how these supposed in-kind contributions violate the Act; nowhere in the foot-long file of his pleadings and attachments does he allege that the

⁴ Westlaw reports that the District Court's decision was rendered June 14, 2001, but given the dates of the subsequent history, the Westlaw date appears to be incorrect.

1 judicial opinions violate any of the Act's specific limitations, 2 U.S.C. § 441a(a)(1)(A) *et seq.*, or
2 prohibitions, 2 U.S.C. § 441b *et seq.*, on the amounts or sources of contributions. However, a
3 charitable reading of the complaint might infer that it alleges that the judicial opinions were
4 excessive in-kind contributions in violation of 2 U.S.C. § 441a(a)(1)(A). After noting that
5 contributions include "anything of value," Complaint at 16, and asserting that the rulings are
6 "extremely valuable," *id.* at 17, the complainant asserts that his "copyright cases against the
7 Hollywood studios . . . are valued in the millions, if not billions of dollars." *Id.*

8 The Commission is not the only forum to which Mr. Whitehead has addressed his
9 grievances concerning his lack of success before Judge Friedman. First, he directly appealed
10 many of those cases as well as others he lost before other judges of the District Court. He was
11 uniformly unsuccessful in the Court of Appeals, as well. *E.g.*, cases cited in MUR 5237, Rogers
12 Response at 2. Second, in some of these cases, he moved to vacate the district court judgments
13 and for recusal of Judge Friedman, and his appeals of Judge Friedman's denials of these motions
14 were denied as "without merit." *Whitehead v. Paramount Picture Corp.*, No. 01-7062, 2001 WL
15 936260 (D.C. Cir. Jul. 27, 2001); *Whitehead v. Columbia Pictures Indus., Inc.*, No. 01-7061,
16 2001 WL 936263 (D.C. Cir. Jul. 27, 2001); *Whitehead v. Tenet*, 01-5108, 2001 WL 936309
17 (D.C. Cir. Jul. 27, 2001). Finally, he charged Judge Friedman with misconduct before the
18 Judicial Council of the D.C. Circuit. Those charges were dismissed by the Chief Judge of the
19 Circuit and, on review, by the entire Judicial Council as non-cognizable because they were
20 "directly related to the merits of a decision or procedural ruling." MUR 5237, Complaint at 15-
21 16; Attachment 1 (orders of Judicial Council dismissing charges on review); 28 U.S.C.
22 § 372(c)(1) (language from statute that was cited but not quoted in orders).

1 The complainant asserts that decisions of the Court of Appeals and the Judicial Council
2 that were adverse to him also constituted in-kind contributions because "President Clinton and
3 other [sic] benefited from" them. Complaint at 17. Several judges of both the Court of Appeals
4 and the District Court reviewed complainant's appeals and his misconduct charges. However,
5 the original complaint singles out Judge Rogers, who was a member both of panels that
6 considered several of complainant's appeals and the Judicial Council, and Judge Kollar-Kotelly,
7 who was also a member of the Judicial Council. These judges appear to have drawn
8 complainant's particular interest because, among other reasons, Judge Rogers gave a gift to
9 Judge Friedman that was worth \$250 and Judge Kollar-Kotelly's husband's law firm allegedly
10 represented one of the defendants complainant sued. *Id.*

11 Taken as a whole, the complaint and supplements appear to allege that the respondent
12 judges, President and Mrs. Clinton, and others conspired to ensure that complainant's copyright
13 infringement suits were all assigned to Judge Friedman (who, as the apparent hub of the
14 conspiracy, was sure to dismiss them), and that the dismissals were upheld on appeal and on
15 collateral attack, in return for political support, unspecified contributions, and other personal
16 benefits such as "book deals" that were provided to the Clinton-Gore committees, the President
17 and Mrs. Clinton personally, and others by the "Hollywood" and publishing interests whom the
18 complainant was suing.⁵ This conspiracy apparently, or so the complainant theorizes, followed
19 an original conspiracy to steal his intellectual property in the first place. According to the

⁵ Read in this manner, the complaint and supplements are similar to the complaints in MURs 5194 (DeLay) and 5206 (NRSC) in that all three matters raise issues concerning how the Commission should treat benefits allegedly received by the makers of contributions. In MURs 5194 and 5206, the Commission rejected a complainant's contention that "access" enjoyed by contributors constituted "offsets to contributions" that were reportable as disbursements by the recipient committee. By contrast, in this matter the complaint, construed very liberally, alleges that the asserted benefits to the contributors are themselves in-kind contributions to the recipient committees.

1 complainant, other conspirators in one or more of these conspiracies apparently included, in ways
2 that are never made quite clear, the CIA, the Lippo Group, several major law firms and various
3 attorneys who work in them, Washington Area Lawyers for the Arts, Delegate Eleanor Holmes
4 Norton, Steven Spielberg, David Geffen, Black Entertainment Television, a number of
5 complainant's former counsel, Howard University, choreographer Debbie Allen, numerous
6 judges of the District of Columbia Superior Court, Georgetown University, Marc Rich, the
7 Washington Post, Tom Cruise, the Rev. Jesse Jackson, the Washington Afro American, the FCC,
8 and Pauline Kanchanalak, among others. *Cf. Whitehead v. Clinton*, No. Civ. A. 99-2891 (PLF),
9 1999 WL 33326727 (D.D.C. Nov. 8, 1999) (describing similar conspiracy theory in lawsuit filed
10 by same complainant against then-President), *aff'd*, No. 99-5392, 2000 WL 520719 (D.C. Cir.
11 March 23, 2000), *pet. for cert. dismissed*, 531 U.S. 976 (2000) (petition dismissed after leave to
12 proceed *in forma pauperis* denied under Court's Rule 39.8).

13 The Clinton-Gore committees and Judges Friedman and Kollar-Kotelly argue that the
14 complaint is vague, unspecific, and fails to allege any violation of the Act. *See* MUR 5237,
15 Clinton-Gore response at 1-2; Friedman/Kollar-Kotelly Response at 1. All of the judge
16 respondents additionally argue that Federal judicial rulings are not contributions within the
17 meaning of 2 U.S.C. § 431(8), and that Federal judges performing official duties are not
18 "persons" within the meaning of 2 U.S.C. § 431(11) and are therefore unable to make
19 "contributions" as defined in 2 U.S.C. § 431(8). MUR 5237, Friedman/Kollar-Kotelly Response
20 at 2; Rogers Response at 2-3.

21 **III. ANALYSIS**

22 Any person who believes a violation of the Act has been committed may file a complaint
23 with the Commission. 2 U.S.C. § 437g(a)(1). The Commission may find "reason to believe"

1 and commence an investigation in a complaint-generated matter if the complaint "sets forth
2 sufficient specific facts which, if proven true, would constitute a violation of [the Act]." MUR
3 4960, Statement of Reasons, citing 11 C.F.R. § 111.4(a) and (d). However, in reviewing a
4 complaint at the reason-to-believe stage, "[u]nwarranted legal conclusions from asserted facts . . .
5 or mere speculation . . . will not be accepted as true." *Id.* (citations omitted).

6 The complaint in this matter is nothing but "unwarranted legal conclusions from asserted
7 facts" and "mere speculation." Indeed, complainant's legal conclusions are "unwarranted" in
8 large part because they depend on "mere speculation." A "contribution" includes "any gift,
9 subscription, loan, advance, or deposit of money or anything of value made by any person *for the*
10 *purpose of influencing any election for Federal office.*" 2 U.S.C. § 431(8)(A)(i) (emphasis
11 added). Whether or not a hypothetical judicial opinion might qualify as a "contribution" from a
12 judge in his or her personal capacity to a candidate or committee if it was corruptly exchanged
13 for a benefit provided to the candidate or committee, the complainant here offers nothing but the
14 wildest speculation to connect the decisions adverse to him to any Federal election in any
15 manner, much less a corrupt one. In fact, complainant's theory that the decisions were
16 contributions appears to be based not as much on any alleged facts as it is on complainant's hope
17 of using the Commission as a forum to relitigate his unsuccessful copyright infringement and
18 judicial misconduct claims. But those questions, of course, are not within the Commission's
19 jurisdiction. Moreover, and as noted *supra* at 7, the complaint appears to share many attributes
20 with the District Court complaint complainant filed in *Whitehead v. Clinton*. The court
21 dismissed that case *sua sponte* under the authority of, *inter alia*, 28 U.S.C. § 1915(e)(2), a
22 portion of the Federal *in forma pauperis* statute. *Whitehead v. Clinton, supra*, citing *Neitzke v.*
23 *Williams*, 490 U.S. 319, 327-28 (1989) and *Best v. Kelly*, 39 F.3d 328, 330-31 (D.C. Cir. 1994).

Case 5:20-cv-01234-22

1 The administrative complaint here does not appear to present any material facts that would
2 warrant a different result if it were filed in Federal court. Therefore, by definition it cannot
3 surmount the bar on complaints supported only by "unwarranted legal conclusions from asserted
4 facts" or "mere speculation" that the Commission described in its Statement of Reasons in MUR
5 4960.

6 Accordingly, this Office recommends that the Commission find no reason to believe that
7 any of the respondents herein violated any provision of the Act in connection with this matter,
8 approve the appropriate letters, and close the file.

9 **III. RECOMMENDATIONS**

10 1. Find no reason to believe any of the respondents herein violated any provision of
11 the Federal Election Campaign Act of 1971, as amended, in connection with this matter.
12

13 2. Approve the appropriate letters.
14

15 3. Close the file.
16
17
18

19 2/25/02
20 Date


Lawrence H. Norton
General Counsel

21
22
23
24 **Attachments:**

25
26 1. Notices and Orders dismissing Judicial Council complaints
27
28